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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 465

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

No. 466

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant*

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Maryland

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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STATEMENT

These appeals present novel and important questions arising out of the following proceedings:

In February 1953, the railroads serving the ports of Philadelphia, New York and Boston published reduced rail rates on imported iron ore to certain points in the Youngstown, Ohio, area on the same level as those applying from Baltimore in an attempt to share in a new and expanding movement of iron ore from

foreign sources to the Youngstown area. The reduced rates from Baltimore had been made effective in October, 1950. Almost immediately, the Baltimore rail carriers, which had theretofore enjoyed a monopoly on this new traffic, published 20-cent reductions in their rates, and the Philadelphia carrier did likewise. The Interstate Commerce Commission suspended all of the proposed schedules and entered into an investigation concerning the lawfulness of the proposed rates under the provisions of Section 15(7) of the Interstate Commerce Act.

After lengthy proceedings, the Commission in October 1956 approved the equalizing rates published by the Philadelphia and New York carriers to the Youngstown area. The proposed equalizing rates from Boston were found not to be compensatory and were ordered cancelled.* The subsequently published 20-cent reductions from Baltimore and Philadelphia were also disapproved, the Commission finding that little if any evidence was offered to justify them. The New York rates were approved by the Commission after they were found to be compensatory, competitively necessary, not otherwise unlawful and consistent with the National Transportation Policy—the tests usually employed by the Commission in determining the lawfulness of carrier-proposed rates. Although the Commission was requested by the New York railroads to exercise its powers under section 15(1) to prescribe a parity of rates and by the Baltimore carriers to pre-

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* A statutory three-judge District Court for the District of Massachusetts affirmed the Commission's disapproval of the rates proposed from Boston in *Boston and Maine Railroad* v. *United States*, 153 F. Supp. 952, and those rates are not in issue here.

scribe differentially related rates, it refused to prescribe any rates, merely approving those rates which it found had been justified and disapproving those which had not been justified.

In a suit brought by the Baltimore railroads and supporting civic and commercial interests, a statutory three-judge District Court for the District of Maryland affirmed the Commission's orders insofar as they disapproved the subsequent 20-cent reductions from Baltimore and Philadelphia and, since no appeal was taken from that finding, the lawfulness of those rates is no longer in issue. With respect to the equalizing rates from Philadelphia, the District Court ordered the case remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to Baltimore and Philadelphia and as to the volume of such traffic passing through those two ports.* Pending such findings, the District Court order permits the equalizing Philadelphia rates to remain in effect.

The District Court vacated the Commission's orders insofar as they approved the equalizing rates from New York to the Youngstown area and permanently enjoined the Commission from "taking, authorizing, approving or permitting any action, by any railroad company" which would have the effect of establishing or making such rates effective. Thus, the equalizing rates from New York have never been allowed to become effective and under the District Court order could not be established now or in the future.

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* The equalizing rates from Philadelphia became effective on February 19, 1954, after Division 2 of the Commission unanimously approved the Philadelphia rates but by a 2-to-1 vote disapproved the New York rates.

The opinion of the District Court makes it clear that it did not understand the nature or effect of the Commission's action which it was reviewing. In this proceeding the Commission merely passed upon the lawfulness of carrier-proposed rates and refused to prescribe any rates. The District Court, however, construed the Commission's decision as determining the proper rate relationship between the ports and as prescribing a parity of rates to be observed in the future. In the opening paragraph of its opinion, the District Court states that the suit was brought to set aside decisions and orders of the Commission "which prescribe parity of railroad rates."*

The District Court, obviously failing to appreciate the distinction between voluntary rate action by carriers and prescription of rates by the Commission over carrier objections, held that the Commission did not make the necessary findings to justify its action, which the District Court variously characterized as a "striking down of the long established differential in favor of Baltimore"** or as an adjustment of "rates and differentials for the purpose of diverting traffic from one locality to another." In its opinion the District Court refers to and evidently accepts the Commission's

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* In other parts of its opinion, the District Court correctly states that the Commission merely approved equalizing rates from Philadelphia and New York, but the District Court makes it clear that it considers this to be tantamount to or in effect a prescription of parity rates.

** The District Court erroneously holds that the differential-rate adjustment applying from the four ports of Baltimore, Philadelphia, New York and Boston to the Youngstown area on merchandise traffic also applied on iron ore traffic, although the Boston rate on iron ore has never been related to the others and no iron ore ever has moved through New York to the Youngstown area.

findings which justified and required approval of the carrier-proposed New York rates, but holds these findings insufficient to justify the prescription of rate parity by the Commission, which the District Court erroneously assumes was the Commission's action.

ARGUMENT.

1. In their Motion to Affirm,* the Baltimore railroads, who are mainly responsible for the District Court's confusion as to the nature of the Commission's action, for the first time correctly describe the Commission's action with respect to the New York rates as follows (Motion to Affirm, p. 23):

> In this proceeding the only action taken by the Commission was to approve as "just and reasonable" under Section 15(7) a reduced rate from New York which was the same as the rate from Baltimore. The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record.

With this statement, these appellants have no quarrel.** What follows, however, is subject to serious objection. On the next page of their Motion to Affirm, the Baltimore railroads go on to say:

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* The arguments and contentions in all three Motions to Affirm are substantially the same and this brief is in reply to all three, although specific reference is made herein only to that filed by the Baltimore & Ohio Railroad and the Western Maryland Railway.

** With respect to the Philadelphia equalizing rate, the Baltimore railroads still try to argue at page 13 of their Motion to Affirm that "the Commission required (or 'prescribed') parity."

> Accordingly, the effect of the District Court's judgment is to preclude from New York the same rate as from Baltimore on the basis of the present record. In no way, however, would the order of the District Court operate to prevent the New York appellants, if they should want to try again, from seeking to justify on a different record the same rates which, on this record, the District Court enjoined. Nor would the order of the District Court stand in the way of the Commission's reopening the proceeding either on petition or by its own initiative. Thus a continuance of the administrative process is not cut off. On the contrary, its continuance depends on the initiative of the New York appellants in bringing another proceeding under Section 15(7), or action by the Commission in continuing the present proceeding.

Having misled the District Court into believing that the Commission had prescribed a parity of rates and having secured a reversal by the District Court, the Baltimore railroads now urge this Court to affirm the District Court decision by attempting to mislead it as to the nature of the District Court's decree. The District Court's decree (Jurisdictional Statement of these Appellants, Appendix B, page 41a) in the first paragraph vacates the Commission's order insofar as it approves the equalizing rates from New York and in the third paragraph directs the Commission to make and enter an appropriate order requiring the New York railroads to cancel their schedules. If, as the Baltimore railroads contend, the District Court intended to leave the New York carriers free to file new schedules proposing equalizing rates and justify them, these two paragraphs would have sufficed. But the District Court, in the second paragraph of its decree, makes permanent a restraining order which enjoins

the Commission "from taking, authorizing, approving or permitting any action, by any railroad company" which would *have the effect* of establishing or making effective the equalizing rates from New York. Thus, contrary to the contention of the Baltimore railroads, the New York carriers would never be able to make effective equalizing rates from New York if the District Court's order is affirmed.

The argument of the Baltimore railroads only makes it clear that the District Court's decision should be reversed and the Commission's decision should be affirmed. Although the District Court's decree prevents the New York carriers from publishing equalizing rates, there is nothing in the decisions or orders of the Commission or the District Court which prevents the Baltimore carriers from publishing any reduced rates they desire and making effective any reduced rates whose lawfulness they can prove. The 20-cent reductions proposed by the Baltimore carriers were disapproved by the Commission because no serious attempt was made to justify them, and in fact the Baltimore carriers themselves urged their disapproval.* There is nothing to prevent the Baltimore carriers from filing new reduced rates, and if they can prove that such rates would be compensatory, no lower than necessary to meet the competition, not otherwise unlawful, and in accord with the National Transportation Policy, the Commission would of course have to approve such rates. The New York railroads who have successfully met these tests before the Commission in

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* The Baltimore carriers urged the Commission to disapprove all of the proposed schedules and to prescribe differentially higher rates from Philadelphia, New York and Boston than from Baltimore.

justifying their own rates should not be denied the right to participate in the movement of imported iron ore merely because the District Court did not understand the nature of the Commission's action.

If the District Court's decision is reversed and the Commission's decision is affirmed, the necessary facility could be built at New York and the iron ore traffic could start to move through that port. Unless the District Court's decision is reversed, the carriers serving New York are permanently deprived of their right to compete because of the Baltimore carriers' unsupported claims that such competition, if authorized, would be too keen.

2. After finally admitting the nature of the Commission's action and the principles under which the lawfulness of the rates from New York are to be determined, the Baltimore railroads now urge that certain tests were not met* or that the Commission's findings were not sufficiently specific. They argue that the Commission's findings were either inadequate or erroneous on the questions whether the New York rates are (a) lower than necessary to meet the competition, (b) in violation of the provisions of section 3(1), and (c) in accord with the National Transportation Policy. Now that they have been forced to admit the true nature of the Commission's action, the Baltimore carriers cannot successfully make such arguments. Even the District Court in its opinion referred, without apparent criticism, to the Commission's findings which the Baltimore railroads now claim were inadequate or not made at all. In its opinion (Jurisdictional State-

* Even the Baltimore railroads evidently concede that the New York rates are compensatory and just and reasonable *per se*.

ment of these Appellants, Appendix A, page 34a), the District Court states:

> It is obvious that the principal basis for the Commission's decision was its finding that parity of rates on imported iron ore moving westerly from the Atlantic Coast to the interior was necessary to insure the maintenance of New York, Philadelphia and Baltimore as ports of entry in furtherance of the policy of Congress to build up a national transportation system.

The District Court, however, was of the opinion that such findings did not justify the prescription of parity rates by the Commission (which it erroneously believed the Commission's action to be). It is too late for the Baltimore carriers now to claim that no such findings were made.

3. The argument on which the Baltimore railroads seem to place the heaviest emphasis is that in order to approve the equalizing rates from New York, the Commission had to make a specific finding that such rates would be in compliance with the provisions of section 3(1) of the Interstate Commerce Act and that it failed to do so. The District Court on the other hand, evidently felt that the Commission had made the necessary finding on this point as to the New York rates, but that the Commission erred in finding that section 3(1) would not be violated by a parity of rates which it erroneously believed the Commission had prescribed. The fact that the District Court reversed the Commission's decision and vacated the order as to the New York rates, instead of remanding for additional findings as it did with respect to the Philadelphia rates, seems to confirm this.

In a complaint brought under section 13 of the Interstate Commerce Act alleging that certain rates violate section 3(1), the Commission would of course have to make a specific finding that the rates do or do not violate section 3(1). An investigation under section 15(7) concerning the lawfulness of carrier-proposed rates of the type here involved, however, is a totally different proceeding. Section 15(7) provides that in such a proceeding "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." In the ultimate conclusions in its report, the Commission found that the equalizing rates from New York and Philadelphia "are just and reasonable." (299 I.C.C. 210) The carrier's burden to prove a proposed rate is "just and reasonable" does not mean that rates shown to be just and reasonable under section 1 will automatically be approved by the Commission. Where evidence is introduced tending to show that proposed rates would violate any other provisions of the act, the carrier's burden of proving the proposed rates "just and reasonable" includes the burden of rebutting such evidence, and the Commission must find the rates not otherwise unlawful before approving them as just and reasonable. In the same way that the carrier's statutory burden of proving proposed rates "just and reasonable," includes the burden of proving them not otherwise unlawful, so the Commission's formal finding that rates are "just and reasonable" necessarily includes a finding that they are not otherwise unlawful.

Although the Commission must, of course, make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of its order, the essential findings will vary with the context of the situation presented.

Alabama G.S.R. Co. v. *United States*, 340 U.S. 216. Here there can be no question that the Commission made the essential findings.

The proposed equalizing rates from New York to Youngstown were alleged not only to be in violation of section 3(1), but were attacked before the Commission on several other grounds. In addition to the allegation that the equalizing rates would result in undue preference of New York and undue prejudice to Baltimore, the rates were objected to on such various grounds as (a) being unduly low, (b) constituting a threat to the port-differential adjustment applicable on other import traffic, and (c) jeopardizing the entire iron-ore rate structure in violation of various sections of the act. To the extent that evidence was introduced to support these allegations, such evidence was considered by the Commission and was discussed in the Commission's two reports. After considering all the evidence, the Commission concluded that the rate reductions proposed by the New York and Philadelphia carriers were not unlawful. The Commission stated in its report (299 I.C.C. 208):

> It has long been recognized that carriers may, *within lawful bounds*, so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. *That appears to be what the respondents here have attempted to do.* (Emphasis added)

Obviously this meant that the proposed rates did not violate section 3(1), or section 1(5), or section 15a(2), or any other section on which the allegations were based. It was clearly unnecesssary for the Commission to refer to each section by number and make a separate finding that that particular section would not be violated.

There was no showing that equalized rates from New York would cause such a drastic diversion of traffic from Baltimore as to work undue prejudice to that port in violation of section 3(1). In fact, the Commission concluded that traffic at Baltimore will increase, even with equalized rates from New York. The Commission stated (299 I.C.C. 209):

> As stated by the division in the prior report, at page 554, the record is persuasive that the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia and this appears to be a reasonable assumption with rate parity also at New York.

Any contention that the Commission did not consider or pass upon the question of undue prejudice to Baltimore is obviously without merit.

It should be borne in mind that a rate schedule initiated by a carrier must be upheld as lawful by the Commission unless adequate reasons are presented for setting it aside. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499. Also, where the Commission finds rates under suspension not shown to be unlawful, the finding does not constitute approval or a prescription of the rates under suspension and they stand only as carrier-made rates. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671. If, after equalized rates are made effective and the necessary unloading facility is built at New York, it appears that Baltimore cannot compete with New York under equal rates, there would be nothing to prevent the Baltimore interests from publishing and making effective such lower rates as they can justify or filing a complaint against the New York rates as being in violation of section 3(1). But there was no evidence

on which the Commission could find that a violation of section 3(1) would result at the present time.

Although these rates apply on iron ore from all sources, from many of which New York is more distant than the competing ports, the Baltimore carriers tried to make it appear that only ore from Labrador was involved and argued that New York, being a shorter distance from Labrador, would have an undue advantage over Baltimore in the form of lower water costs to New York. Then, the Baltimore carriers failed to introduce any evidence by which the Commission could compute the amount, if any, of this claimed water-cost disadvantage. Now they are trying to capitalize on their failure to put in such evidence by contending that the Commission's report is deficient because it made no specific finding as to the amount of this claimed water-cost disadvantage.

Even if there were some substance to the Baltimore claim of a water-cost disadvantage on Labrador ore, the evidence made it clear that the New York carriers would have a chance to compete under equalized rates only for a small fraction of the Labrador ore. The New York equalizing rates would apply to only 7 points, while those of the Baltimore and Philadelphia carriers apply to 17 points. About 90 percent of the Labrador ore production is controlled by steel companies whose plants are located at points not reached by the New York carriers and by a company tied to Philadelphia by virtue of its operation of the ore-unloading facility at that port. The New York carriers would have a real opportunity to compete only with respect to the remaining 10 percent of the Labrador ore.

In the present factual situation, the Commission made all the findings which it was possible for it to

make and all the findings which are essential to the statutory validity of its order.

The Baltimore carriers' contention that the Commission did not make the necessary findings is inconsistent with the District Court's opinion, which seems to hold that the Commission made a finding on the section 3(1) question as to the New York rates, but that the finding was incorrect. The District Court does not say so in so many words, but in various parts of its opinion, makes general statements of principle such as:

> Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. (Jurisdictional Statement of these Appellants, Appendix A, page 32a)

Since the District Court did not remand the cause to the Commission with respect to the New York rates, it must be concluded that the Court believed the necessary findings had been made, but that the section 3(1) finding was erroneous.

The District Court's opinion makes clear its conclusion that the prescription of parity rates, which the Court erroneously believed the Commission had specifically or in effect accomplished in this proceeding, would violate section 3(1). The two main reasons for this conclusion seem to be the Court's belief that (1) rates must reflect differences in distance and (2) carriers cannot be forced to depart from voluntarily maintained, long-established differential rate relationships. Whatever may be the weight to be accorded such arguments where the Commission prescribes rates over carrier objections, they obviously do not apply where, as here, the carriers themselves wish to disregard differences in distance for competitive reasons and publish

equalized rates without which they could not compete. See *New York Central R. Co.* v. *United States*, 99 F. Supp. 394, affd. *Interstate Commerce Commission* v. *New York Central R. Co.*, 342 U.S. 890.

It has long been established that the question of whether undue preference or prejudice exists is for the Commission and its finding, supported by substantial evidence, is conclusive unless there was some irregularity in the proceeding or some error in the application of rules of law. It is beyond the province of the Court to consider the weight of the evidence before the Commission or the soundness of the reasoning by which its conclusions were reached. *Virginian Ry. Co.* v. *United States*, 272 U.S. 658. Here, the District Court has violated this long-established principle and substituted its own judgment for that of the Commission.

CONCLUSION

It is therefore respectfully submitted that the Motion to Affirm should be denied and that this Court should note probable jurisdiction.

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